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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

MOTION TO STRIKE MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

MOTION TO STRIKE MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

Appellees in the above entitled case, pursuant to Rule 35 of the Revised Rules of the Supreme Court of the United States, move this Court to strike from its files the Memorandum for the United States and the Interstate Commerce Commission heretofore filed herein because neither the United States nor the Interstate Commerce Commission are proper parties before this Court

on this appeal and because the filing of such memorandum violates the Federal Rules of Civil Procedure and the Revised Rules of the Supreme Court of the United States. As grounds for this motion appellees show to this Court as follows:

1. The participation of the United States and the Interstate Commerce Commission in this appeal before this Court is contrary to Rules 72 and 74 of the Federal Rules of Civil Procedure and to Rules 10, 11, 13 and 15 of the rules of this Court in that neither the United States nor the Interstate Commerce Commission have filed a Notice of Appeal in the United States District Court for the Eastern District of Wisconsin or a Jurisdictional Statement in this Court. Therefore, neither has properly invoked the appellate jurisdiction of this Court, and neither is a proper party to this appeal entitled to file any document relating thereto or otherwise to appear before this Court herein.

2. Neither the United States nor the Interstate Commerce Commission considered the decision of the lower court herein "sufficiently important to warrant seeking review in this Court,"[1] and, having elected not to appeal from the decision of the lower court, neither should be permitted now to participate in this proceeding.

3. Such memorandum was filed in this Court subsequent to the filing of appellees' Motion To Affirm, and appellees therefore have no opportunity under the rules of this Court to answer the allegations and arguments contained in such memorandum.

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[1] Memorandum for the United States and the Interstate Commerce Commission, page 1.

4. Such memorandum propounds a question which is not before this Court because not raised by appellant's Jurisdictional Statement. Such memorandum therefore attempts to broaden the issues before this Court in violation of the law of this case which requires that the participation herein by the United States and the Interstate Commerce Commission, if any, be limited to the question upon appeal as it exists at the commencement of such participation, namely, at the time such memorandum was filed.

5. The United States and the Interstate Commerce Commission failed to serve a copy of such memorandum on counsel of record in violation of Rule 33 of the Revised Rules of the Supreme Court of the United States in that such memorandum was not served upon Mr. Philip H. Porter, 708 First National Bank Building, Madison 3, Wisconsin, or upon Mr. Richard R. Robinson, 225 East Mason Street, Milwaukee 2, Wisconsin, both of whom are counsel for one or both appellees herein and both of whom appeared in the lower court on behalf of one or both plaintiffs.

6. Contrary to Rule 15(1)(e) of the rules of this Court, the United States and the Interstate Commerce Commission have not attempted to show that the additional question presented in their memorandum is substantial. Appellees believe such question is not substantial, and appellant evidently concurs because such question was omitted from its Jurisdictional Statement. Such memorandum, therefore, has no bearing upon any issue which warrants consideration by this Court. It should be stricken because completely irrelevant, immaterial and extraneous to the question properly before this Court on this appeal.

7. Procedural due process of law requires at least a semblance of adherence to rules designed to insure: that a litigant is fully apprised of the opponent's case, that sufficient opportunity to contest it is afforded, that jurisdiction of the court over the subject matter and the parties is manifest, that the parties are certain of the identity of their opponents, and that an interminable interjection of new matter or intervention of additional parties is avoided. The filing of the Government's memorandum in this appeal is contrary to such elemental concepts of "fair play" among litigants and violates the requirements of procedural due process.

8. To permit the United States or the Interstate Commerce Commission to participate in this appeal without complying with the Federal Rules of Civil Procedure or with the rules of this Court as aforesaid would accord them a privilege, denied other litigants, to come before this Court without complying with the procedural and substantive rules which govern the conduct of litigation herein. To permit them to do so in this instance would abrogate such rules and establish a precedent permitting recourse to this Court without regard to orderly procedure and the requirements of procedural due process of law.

Wherefore, the Memorandum For the United States and the Interstate Commerce Commission should be stricken from the files of this case, and the United States and the Interstate Commerce Commission should be

denied the opportunity to appear before this Court on this appeal.

Respectfully submitted,

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February, 1964

CERTIFICATE OF SERVICE.

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

In addition I have this day served the foregoing document upon each of the following persons by mailing a copy thereof properly addressed with postage prepaid by first-class mail to:

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Dated at Chicago, Illinois the ..... day of February, 1964.

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Raymond K. Merrill